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In the Supreme Court of the United States

OCTOBER TERM, 1997

VICKY LEWIS, ET UX., INDIVIDUALLY, AS PARENTS, AS NEXT FRIENDS AND AS ADMINISTRATORS OF THE ESTATE OF KATHRYN C. LEWIS, DECEASED, PETITIONERS

v.

BRUNSWICK CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether petitioners' state common law tort action, based on the respondent's failure to install a propeller guard on a motorboat, is preempted by the Federal Boat Safety Act of 1971, 46 U.S.C. 4306, or by the decision of the Secretary of Transportation to take no regulatory action to require the installation of propeller guards on recreational boats.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Summary of argument	10
Argument:	
Petitioners' claims are not preempted by either the Federal Boat Safety Act or the Coast Guard's decision not to promulgate a propeller guard regulation	12
A. The text of the Act does not support a finding of express preemption of petitioners' common law claims	13
B. The Coast Guard's decision not to regulate propeller guards does not impliedly preempt state common law tort claims alleging that the manufacturer should have installed a propeller guard	25
Conclusion	30

TABLE OF AUTHORITIES

Cases:

Arkansas Elec. Coop. Corp. v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983)	27, 28
Becker v. *U.S. Marine Co.*, 943 P.2d 700 (Wash. App. 1997)	19
Beech v. *Outboard Marine Corp.*, 584 So. 2d 447 (Ala. 1991)	19, 24
Bethlehem Steel Co. v. *New York State Labor Relations Bd.*, 330 U.S. 767 (1947)	28
Boatland of Houston, Inc. v. *Bailey*, 609 S.W.2d 743 (Tex. 1980)	20
Bonito Boats, Inc. v. *Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989)	28

Cases—Continued: Page

CSX Transp., Inc. v. *Easterwood*, 507 U.S. 658 (1993) 13, 27
Calabro v. *Outboard Marine Corp.*, 599 So. 2d 717 (Fla. Ct. App. 1992) 24
Cipollone v. *Liggett Group, Inc.*, 505 U.S. 504 (1992) 17, 18
City of Chicago v. *Environmental Defense Fund*, 511 U.S. 328 (1994) 21
Davis v. *Brunswick Corp.*, 854 F. Supp. 1574 (N.D. Ga. 1993) 19
Degen v. *Bayman*, 241 N.W.2d 703 (S.D. 1976) 19, 24
Detroit Marine Eng'g v. *McRee*, 510 So. 2d 462 (Miss. 1987) 19
Dubecky v. *S2 Yachts, Inc.*, 651 N.Y.S.2d 602 (App. Div. 1996) 19
English v. *General Elec. Co.*, 496 U.S. 72 (1990) 19, 22, 25
Fitzpatrick v. *Madonna*, 623 A.2d 322 (Pa. Super. Ct. 1993) 19
Freightliner Corp. v. *Myrick*, 514 U.S. 280 (1995) ... 9, 16, 25, 26, 27, 28
Goodyear Atomic Corp. v. *Miller*, 486 U.S. 174 (1988) 22
Hines v. *Davidowitz*, 312 U.S. 52 (1941) 25, 26, 28
Keene Corp. v. *United States*, 508 U.S. 200 (1993) .. 21
Medtronic, Inc. v. *Lohr*, 116 S. Ct. 2240 (1996) 13, 28
Moss v. *Outboard Marine Corp.*, 915 F. Supp. 183 (E.D. Cal. 1996) 19
Napier v. *Atlantic Coast Line R.R.*, 272 U.S. 605 (1926) 29
Puerto Rico Dep't of Consumer Affairs v. *Isla Petroleum Corp.*, 485 U.S. 495 (1988) 27, 28
Ray v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978) 28, 29
Rose v. *Mercury Marine*, 483 So. 2d 1351 (Miss. 1986) 19

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Seymour v. *Brunswick Corp.*, 655 So. 2d 892 (Miss. 1995) 24
Silkwood v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984) 22
United States v. *Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947) 23
Van Berkum v. *Christian*, 530 N.E.2d 52 (Ill. App. 1988) 19
Veal v. *Teleflex, Inc.*, 586 So. 2d 188 (Ala. 1991) 24
Young v. *Tide Craft, Inc.*, 242 S.E.2d 671 (S.C. 1978) 19, 20

Statutes and regulations:

Act of June 9, 1910, ch. 268, §§ 2-6, 36 Stat. 462-463 ... 2
Act of June 7, 1918, ch. 93, 40 Stat. 602 2
Act of Apr. 25, 1940, ch. 155, 54 Stat. 163 2
Administrative Procedure Act, 5 U.S.C. 553 5
Federal Boat Safety Act of 1971, Pub. L. No. 92-75, 85 Stat. 213:
§ 2:
85 Stat. 213-214 4
85 Stat. 214 4
§ 9, 85 Stat. 217 15
§ 10, 85 Stat. 217 15
Federal Boat Safety Act of 1971, 46 U.S.C. 4301-4311 1
46 U.S.C. 4302 ..... 5, 13, 16, 18
46 U.S.C. 4302(a) 1, 20, 29
46 U.S.C. 4302(a)(1) 11, 13
46 U.S.C. 4302(c)(1) 5
46 U.S.C. 4302(c)(2) 5
46 U.S.C. 4302(c)(3) 5
46 U.S.C. 4302(c)(4) 5
46 U.S.C. 4306 ..... 8, 10, 11, 13, 14, 16, 17, 18, 21, 22
46 U.S.C. 4311(g) 8, 11, 21, 22, 24

Statutes and regulations—Continued: Page

Federal Boating Act of 1958, Pub. L. No. 85-911, 72 Stat. 1754:
§ 9, 72 Stat. 1757 2
§ 13(4), 72 Stat. 1758 2
National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1381 *et seq.* 10, 16
15 U.S.C. 1392(d) (1988) 16
Ports and Waterways Safety Act of 1972, Pub. L. No. 92-340, 86 Stat. 424 29
46 U.S.C. 391a(3) (1976) 29
17 U.S.C. 301(a) 23
29 U.S.C. 1144(c)(1) 23
46 U.S.C. 3703(a) 29
46 U.S.C. 13110(b)(1)(A)-(C) 6
33 C.F.R.:
Pt. 173 5
Pt. 174 5
Pt. 175 5
Pt. 177 5
Pt. 179 5
Pt. 181 5
Pt. 183 5
Pt. 187 5
49 C.F.R. 1.46(n)(1) 5

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36 Fed. Reg. (1971):
p. 15,764 15
p. 15,765 15
38 Fed. Reg. (1973):
p. 71 15
p. 6914 15
60 Fed. Reg. 25,191 (1995) 8, 24
61 Fed. Reg. 13,123 (1996) 8

Miscellaneous—Continued: Page

62 Fed. Reg. (1997):
p. 22,991 8
p. 44,507 8
H.R. Rep. No. 1162, 61st Cong., 2d Sess. (1910) 2
H.R. Rep. No. 361, 65th Cong., 2d Sess. (1918) 2
H.R. Rep. No. 324, 92d Cong., 1st Sess. (1971) 14
Letter from Robert T. Nelson, Rear Admiral, U.S. Coast Guard, Office of Navigation, Safety and Waterway Services to A. Newell Garden, Chairman, National Boating Safety Advisory Council (Feb. 1, 1990) 7
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Recreational Boat Safety: Hearings on H.R. 15041, 15140 Before the Subcomm. on Coast Guard, Coast and Geodetic Survey, and Navigation of the House Comm. on Merchant Marine & Fisheries, 91st Cong., 2d Sess. (1970) 4
S. Rep. No. 676, 76th Cong., 1st Sess. (1939) 2
S. Rep. No. 2340, 85th Cong., 2d Sess. (1958) 3
S. Rep. No. 248, 92d Cong., 1st Sess. (1971) 3, 4, 5, 14, 20, 21, 22
Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. Legal Stud. 357 (1984) 23
Webster's Third New International Dictionary (1986) 18

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INTEREST OF THE UNITED STATES

The Federal Boat Safety Act of 1971, 46 U.S.C. 4301-4311, authorizes the Secretary of Transportation to promulgate appropriate federal safety standards for recreational boats. 46 U.S.C. 4302(a). This case concerns the preemptive effect of the Secretary's decision not to take any regulatory action requiring boat manufacturers to install propeller guards on motorboats. The Court's decision may have a substantial effect on the manner in which the Secretary exercises his regulatory authority under the Act.

STATEMENT

1. a. For much of this century, Congress has imposed statutory requirements to promote motorboat safety. In 1910, for example, Congress enacted a requirement that

motorboats of specified sizes carry lights and safety equipment. See Act of June 9, 1910, ch. 268, §§ 2-6, 36 Stat. 462-463. The purpose of that law was to "prevent[] collisions of vessels and to regulate equipment of certain motor boats on the navigable waters of the United States." H.R. Rep. No. 1162, 61st Cong., 2d Sess. 1 (1910). A law passed in 1918 required motorboats to be numbered, in part to facilitate enforcement of the safety requirements imposed by the 1910 statute. See Act of June 7, 1918, ch. 93, 40 Stat. 602; see also H.R. Rep. No. 361, 65th Cong., 2d Sess. 1 (1918).

In 1940, Congress promulgated a major overhaul of the existing requirements concerning motorboats. See Act of Apr. 25, 1940, ch. 155, 54 Stat. 163. The principal purposes of that law were to expand the definition of "motorboat," to provide for local inspectors to ensure compliance with equipment and design requirements, and to impose penalties on persons who operated motorboats in a reckless or negligent manner. *Ibid.*; see also S. Rep. No. 676, 76th Cong., 1st Sess. (1939). In 1958, Congress enacted further boat numbering requirements and declared it "to be the policy of Congress to encourage uniformity of boating laws, rules, and regulations as among the several States and the Federal Government to the fullest extent practicable, subject to reasonable exceptions arising out of local conditions." Federal Boating Act of 1958, Pub. L. No. 85-911, § 9, 72 Stat. 1757. Because that law contemplated a system of state numbering of vessels, it had to address the coordination of jurisdiction between States and the Federal Government. Congress provided that "[n]othing herein shall interfere with, abrogate or limit the jurisdiction of any State" with respect to its numbering system. *Id.* § 13(4), 72 Stat. 1758. The Department of Treasury's

comments on the proposed legislation reflect agreement with that scheme:

> The relinquishment by the Federal Government to the States of a portion of its traditional control of motorboating appears to be a logical and healthy approach to the partial solution of the vast problem of recreational boating safety. The magnitude and complexity of adequate control and the encouraging response of State governments dictate coordination and continuing cooperation between sovereign governments in this field.

S. Rep. No. 2340, 85th Cong., 2d Sess. 5 (1958).

By the early 1970s, approximately 40 million Americans were engaging in recreational boating activities each year in approximately 9 million boats. S. Rep. No. 248, 92d Cong., 1st Sess. 6 (1971).[1] That widespread participation came at a cost, as nearly 7,000 persons lost their lives in boating accidents during the period 1966-1970. *Id.* at 7. In response to those developments, Congress enacted the Federal Boat Safety Act (FBSA) in 1971 "to provide a coordinated national boating safety program involving both the Federal Government and the States * * * [in] a single comprehensive Act dealing with the subject of safety for boats used principally for other than commercial use." *Id.* at 6. Congress intended "to improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the Secretary of the Department in which the Coast Guard is

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[1] The number of registered recreational boats in the United States today is approximately 12 million. National Association of State Boating Law Administrators, *Reference Guide to State Boating Laws* 6 (Ron Sarver & Chris Moore, eds., 2d ed. 1997).

operating—presently the Secretary of Transportation." *Ibid.*

Congress further declared "the purpose of this Act to improve boating safety * * * by encouraging and assisting participation by the several States, the boating industry, and the boating public in [the] development of more comprehensive boating safety programs; by authorizing the establishment of national construction and performance standards for boats and associated equipment; and by creating more flexible regulatory authority concerning the use of boats and equipment." Pub. L. No. 92-75, § 2, 85 Stat. 213-214.[2] Congress also sought "to encourage greater and continuing uniformity of boating laws and regulations as among the several States and the Federal Government, a higher degree of reciprocity and comity among the several jurisdictions, and closer cooperation and assistance between the Federal Government and the several States in developing, administering, and enforcing Federal and State laws and regulations pertaining to boating safety." *Id.* at 214.

To accomplish those goals, the Act authorizes the Secretary of Transportation to prescribe regulations establishing minimum safety standards for recreational boats and associated equipment. See 46 U.S.C. 4302. The Secretary has delegated that rulemaking authority to the Coast Guard. See 49 C.F.R. 1.46(n)(1). In promulgating regulations, the Coast Guard must consider the extent to which the regulations will contribute to recreational vessel safety. 46 U.S.C. 4302(c)(1) and (2). The Coast Guard may not establish regulations compelling substantial alterations of existing boats and associated equipment unless compliance would "avoid a substantial risk of personal injury to the public." 46 U.S.C. 4302(c)(3). Before promulgating a regulation, the Coast Guard must consult with the National Boating Safety Advisory Council (Advisory Council) on the need for regulation and must comply with the notice and comment provision of the Administrative Procedure Act, 5 U.S.C. 553. 46 U.S.C. 4302(c)(4); see S. Rep. No. 248, *supra*, at 19.[3]

b. The question presented by this case is whether the Coast Guard's decision *not* to promulgate a regulation requiring manufacturers to install propeller guards on recreational motorboats preempts a state common law damages action premised on an allegedly negligent failure

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[2] The Senate report states: "The need for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of uniform construction and equipment standards at the Federal level." S. Rep. No. 248, *supra*, at 14. A number of government witnesses in support of the Act emphasized the need for uniform federal construction and equipment standards. See, *e.g.*, *National Boating Safety Program: Hearing on S. 696 Before the Merchant Marine Subcomm. of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 50 (1971) (Admiral Chester R. Bender, Commandant of the Coast Guard); *id.* at 70 (John H. Reed, Chairman, National Transportation Safety Board); *Recreational Boat Safety: Hearings on H.R. 15041, 15140 Before the Subcomm. on Coast Guard, Coast and Geodetic Survey, and Navigation of the House Comm. on Merchant Marine & Fisheries*, 91st Cong., 2d Sess. 66 (1970).

[3] The Coast Guard has promulgated numerous regulations regarding boat safety, specifying equipment to be carried on boats, and mandating design standards for minimum safety requirements. Those regulations address a range of different topics, including: vessel numbering and accident reporting, see 33 C.F.R. Pts. 173, 174; requirements for safety equipment to be carried on boats, such as personal flotation and visual distress signal devices, see *id.* Pt. 175; measures to correct especially hazardous conditions, *id.* Pt. 177; defect notification requirements, *id.* Pt. 179; requirements for manufacturers concerning certifications of compliance, identification of boats, and instructions for personal flotation devices, *id.* Pt. 181; requirements regarding safe boat capacity and flotation devices, and standards for horsepower, electrical, fuel, ventilation, and start-in-gear systems, *id.* Pt. 183; and vessel identification requirements, *id.* Pt. 187.

by the manufacturer to install such a guard. In 1988, the Coast Guard directed the Advisory Council to examine the feasibility and safety advantages and disadvantages of requiring propeller guards on recreational boats.[4] The Advisory Council appointed a Propeller Guard Subcommittee for that purpose. After an extensive review of scientific data and testimony, the Subcommittee determined that the incidence of injuries or fatalities caused by persons coming into contact with propellers was relatively small. See J.A. 92. The Subcommittee also found that propeller guards adversely affect the operation of boats at certain speeds and that such devices could create additional and more severe hazards. See J.A. 69-71. The Subcommittee further concluded:

> Since there are hundreds of propulsion unit models now in existence, and thousands of hull designs, the possible hull/propulsion unit combinations are extremely high. No simple universal design suitable for all boats and motors in existence has been described or demonstrated to be technologically or economically feasible. To retrofit the some 10 to 15,000,000 existing boats would thus require a vast number of guard models at prohibitive cost.

J.A. 71. Therefore, it recommended that the Coast Guard "should take no regulatory action to require propeller guards." J.A. 73.

The Advisory Council accepted the report and adopted its recommendations. See Pet. App. A8. The Coast Guard,

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[4] The Advisory Council must consist of 21 members, equally divided among representatives of "State officials responsible for State boating safety programs," "recreational vessel manufacturers and associated equipment manufacturers," and "national recreational boating organizations and * * * the general public." 46 U.S.C. 13110(b)(1)(A)-(C).

in turn, also accepted the report's recommendations. J.A. 163-167. In a letter to the Advisory Council agreeing with its recommendation that the Coast Guard "should take no regulatory action to require propeller guards," the Coast Guard Chief of the Office of Navigation Safety and Waterway Services wrote:

> The regulatory process is very structured and stringent regarding justification. Available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats. Regulatory action is also limited by the many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation. Additionally, the question of retrofitting millions of boats would certainly be a major economic consideration.
>
> The Coast Guard will continue to collect and analyze accident data for changes and trends; and will promote increased/improved accident reporting as addressed in recommendation 2. The Coast Guard will also review and retain any information made available regarding development and testing of new propeller guarding devices or other information on the state of the art.

Letter from Robert T. Nelson, Rear Admiral, U.S. Coast Guard, Office of Navigation, Safety and Waterway Services to A. Newell Garden, Chairman, National Boating Safety Advisory Council 1 (Feb. 1, 1990) (Coast Guard Letter), J.A. 163.

In recent years, the Coast Guard has continued to study various policy proposals to prevent propeller-related injuries. In 1995, for example, the Coast Guard issued an Advance Notice of Proposed Rulemaking (ANPRM) requesting comment on "the public's present feelings about the use of propeller guards or possible alternatives to

propeller guards on these vessels," a request occasioned by a serious accident involving a rented houseboat. 60 Fed. Reg. 25,191 (1995). In 1996, the Coast Guard issued an ANPRM "to gather current, specific, and accurate information about the injuries involving propeller strikes and rented boats." 61 Fed. Reg. 13,123 (1996). And, in 1997, the Coast Guard sought "comments on the effectiveness of specific devices and interventions which have been suggested for reducing the number of recreational boating accidents involving rented power boats in which individuals are injured by the propeller." 62 Fed. Reg. 22,991 (1997). Because it received few responses to that request, the Coast Guard extended the period for comments. See *id.* at 44,507. The Coast Guard has not issued any regulations to require or prohibit propeller guards in any vessels.

c. Two provisions of the FBSA speak to the preemption issue in this case. The preemption clause of 46 U.S.C. 4306 states that, unless permitted by the Secretary, "a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment * * * that is not identical to a regulation prescribed [by the Coast Guard] under section 4302 of this title." The second pertinent provision, 46 U.S.C. 4311(g), is a savings clause. It states that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law."[5]

[5] Notwithstanding the existence of federal statutory requirements regarding certain aspects of motorboat safety, none of the congressional acts prior to the FBSA in 1971 contained either a preemption clause or a savings clause. See statutes cited at pages 1-3, *supra*.

2. Gary and Vicky Lewis sued respondent Brunswick Corporation in state court to recover damages for the death of their daughter, who died after she fell or was thrown from a boat and was then struck by a Brunswick engine propeller. Petitioners' complaint alleged that the Brunswick engine was defective because it lacked a propeller guard. See J.A. 6-9. Respondent removed the case to federal court on diversity grounds and moved for summary judgment. The district court held that the Lewises' claims are preempted by the FBSA, Pet. App. A31, and the Eleventh Circuit affirmed, *id.* at A1-A25.

The court of appeals rejected the contention that the Lewises' claims are expressly preempted. It stated that "the conflicting language in the preemption and savings clauses" prevented a finding that Congress clearly intended to preclude common law claims. Pet. App. A14. The court also held that this tension between the preemption clause and the savings clause prohibited a finding that Congress expressly intended to save those claims. *Ibid.* As a result, the court held that its decision about preemption depended on whether the Lewises' claims are impliedly preempted by federal law. *Id.* at A15.

In analyzing that question, the court sought to determine whether the Lewises' claims would "prevent or hinder the FBSA from operating the way Congress intended it to operate." Pet. App. A15. The court concluded that at the heart of the regulatory scheme established by the FBSA was Congress's decision to make the Coast Guard the "exclusive authority to issue safety standards." *Id.* at A18. That conclusion led the court to hold that "an absence of federal regulation under the FBSA means that no regulation, state or federal, is appropriate." *Id.* at A20. The court found distinguishable this Court's decision in *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 286 (1995), which held that the failure by the National Highway

Transportation Safety Administration (NHTSA) to promulgate a regulation on antilock brakes under the National Traffic and Motor Vehicle Safety Act of 1966 (NTMVSA), 15 U.S.C. 1381 *et seq.*, did not preempt state common law claims based on the failure to install such brakes on a tractor trailer truck. The court of appeals stated that the NTMVSA, in contrast to the FBSA, did not give the responsible federal agency (NHTSA) the exclusive authority to issue safety standards, but clearly allowed States to impose safety standards on auto manufacturers until the Federal Government came forward with a different standard. Pet. App. A18.

The court of appeals acknowledged that, "[f]rom the savings clause, we know that Congress understood at least some product liability claims to be consistent with the FBSA regulatory scheme." Pet. App. A21. But it decided that only "product liability claims against manufacturers for negligent or defective design of products required by the Coast Guard, or for products provided voluntarily by manufacturers," would be consistent with the FBSA scheme. *Id.* at A22. By contrast, the court found that "claims based on the failure to install a product that the Coast Guard has decided should not be required would conflict with the regulatory uniformity purpose of the FBSA." *Ibid.* Consequently, the court held, the Coast Guard's decision not to impose a propeller guard requirement "impliedly preempts state law requirements of propeller guards, even in the form of common law claims." *Id.* at A24.

SUMMARY OF ARGUMENT

The court of appeals correctly ruled that the express preemption provision in the Federal Boat Safety Act of 1971 (FBSA), 46 U.S.C. 4306, does not preempt petitioners' common law claims. As an initial matter, the Court need not resolve a broader ground of disagreement between the

parties: whether Section 4306 preempts state prescriptive regulations in the absence of a federal rule or regulation. This case involves not a state positive rule, but rather a common law damages action. Section 4306 contains four textual indications that Congress did not intend to foreclose such claims. First, as this Court has noted in a number of cases, courts should not infer that use of the word "law" in the preemption provision includes common law claims absent a clearer indication of that purpose by Congress. Second, the FBSA provides that only a "law or regulation" promulgated by a "State or political subdivision of a State" is subject to express preemption. A court in a common law damages action does not fall within the ordinary meaning of "State or political subdivision of a State" because state judicial officers do not petition the Secretary of a federal department for permission to proceed with a state lawsuit. That reading is consistent with the Coast Guard's practice since 1971 of working with state executive officials to determine whether state laws or regulations conflict with federal standards. Third, the Secretary's permissive authority to promulgate "minimum safety standards" (46 U.S.C. 4302(a)(1)) does not foreclose state tort law judgments that raise the manufacturer's standard of care above the federally required minimum. Finally, the savings clause of 46 U.S.C. 4311(g) *does* expressly contain an intent to preserve "common law" claims. Inclusion of that language in the savings clause but not in the preemption provision further supports a reading that the preemption clause was not intended expressly to preempt state common law claims.

Although the court below correctly concluded that the preemption clause does not expressly preempt petitioners' claims, it erred in ruling that those claims are impliedly preempted by the statutory scheme. Since the Coast Guard concluded after extensive study that the available

data were insufficient to warrant imposition of a regulation regarding propeller guards, there is no federal standard with which a state common law action would conflict. Similarly, a common law tort claim does not defeat the purposes of the Act, since the Coast Guard can promulgate any regulation regarding propeller guards in the future, if the appropriate justifications exist.

ARGUMENT

PETITIONERS' CLAIMS ARE NOT PREEMPTED BY EITHER THE FEDERAL BOAT SAFETY ACT OR THE COAST GUARD'S DECISION NOT TO PROMULGATE A PROPELLER GUARD REGULATION

Under this Court's settled preemption jurisprudence, state law is preempted "in three circumstances":

> First, Congress can define explicitly the extent to which its enactments pre-empt state law. * * * Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. * * * Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

English v. *General Elec. Co.*, 496 U.S. 72, 78-79 (1990) (citations omitted). The court below correctly held that petitioners' claims are not expressly preempted by the Federal Boat Safety Act of 1971 (FBSA), but it erred in holding that those claims are impliedly preempted by the

Coast Guard's decision not to promulgate a regulation concerning propeller guards.

A. The Text Of The Act Does Not Support A Finding Of Express Preemption Of Petitioners' Common Law Claims

1. As with the interpretation of any statutory text, "analysis of the scope of the pre-emption statute must begin with its text." *Medtronic, Inc.* v. *Lohr*, 116 S. Ct. 2240, 2250 (1996). Indeed, although the existence of an express preemption clause does not negate the need for an analysis of implied preemption, see *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 288-289 (1995), "[i]f the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent," *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993).

The preemption clause at issue in this case, 43 U.S.C. 4306, provides:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

Section 4302, in turn, provides in pertinent part that "the Secretary *may* prescribe regulations establishing mini-

mum safety standards for recreational vessels and associated equipment." 46 U.S.C. 4302(a)(1) (emphasis added).

2. The preemption clause of Section 4306 is susceptible of at least two interpretations. One is that States cannot enact positive rules or regulations without the approval of the Secretary, regardless of whether a federal standard is in effect. That reading appears to be favored by respondent. See Br. in Opp. 20. It is supported by the introductory clause of the section, which provides that, "[u]nless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish * * * a law or regulation establishing a[n] * * * equipment performance * * * standard." 46 U.S.C. 4306. The legislative history provides further support for that interpretation. The Senate Report states: "This section provides for federal preemption in the issuance of boat and equipment safety standards. This conforms to the long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce. In this case it also assures that manufacture for the domestic trade will not involve compliance with widely varying local requirements." S. Rep. No. 248, *supra*, at 20.[6]

The Coast Guard has long interpreted the provision to preempt state positive laws and regulations, even when there is no counterpart federal regulation in effect under the Act. The day after the FBSA was enacted, the Secretary of Transportation issued a statement exempting all

[6] The House report, which accompanied a bill that did not contain a savings provision, went even further in describing the preemptive effect of the proposed legislation: "The bill preempts the field on boating standards or regulations. Subject to review by the Secretary, however, States may require certain marine articles to meet uniquely hazardous situations in their States." H.R. Rep. No. 324, 92d Cong., 1st Sess. 11 (1971); see also *id.* at 15-16.

existing state laws from preemption under Sections 9 and 10 of the FBSA. The Secretary explained that "[b]oating safety will not be adversely affected by continuing in effect those existing laws and regulations of the various States and political subdivisions until new boating safety regulations are issued under the Federal Boat Safety Act of 1971." Department of Transportation, Office of the Secretary, Exemption [from Section 10 of the Federal Boat Safety Act] to Preserve Certain State and Local Boat Safety Laws and Regulations, August 11, 1971. See 36 Fed. Reg. 15,764, 15,765 (1971). The Secretary further explained that "[t]his exemption applies only to laws and regulations in effect on the effective date of the Federal Boat Safety Act of 1971 and remains in effect until expressly superseded, revoked, or otherwise terminated." *Ibid.* Two years later, after issuing regulations pertaining to "Manufacturer Requirements" and "Boats and Associated Equipment," the Coast Guard superseded the 1971 general exemption from preemption with a more limited exemption that had the effect of preempting a range of previously exempted state statutes and regulations. See 38 Fed. Reg. 71, 6914 (1973). Subsequent correspondence from the Coast Guard has been consistent with the view that the FBSA preempts state-promulgated rules and regulations regardless of whether a federal standard is in existence.[7]

[7] See, *e.g.*, J.A. 37-38 (letter from Coast Guard to New York Commissioner of Parks and Recreation regarding federal preemption of associated equipment requirements imposed by state navigation law); J.A. 39-40 (internal Coast Guard memorandum regarding comparison of state boating law equipment standards for preemption purposes); J.A. 41-43 (letter from Coast Guard to Illinois Department of Conservation regarding preemption of state fire extinguisher regulations). See also pages 19-20, *infra* (discussing kill switches).

A second possible interpretation of Section 4306 would permit state regulations to exist in the absence of a federal standard, on a reading that focused on the last clause of Section 4306: that a State may not establish a regulation "that is not identical to a regulation prescribed under section 4302 of this title." 46 U.S.C. 4306. Petitioners espouse that reading of the statute. See Pet. 9. Under that interpretation, a federal regulation would have to be in effect before a state law could be preempted by Section 4306.[8] The Coast Guard has not issued formal regulations requiring or prohibiting propeller guards within the meaning of Section 4302. On the contrary, as we have explained, in 1990 the Coast Guard specifically

[8] In advancing that interpretation, petitioners rely on this Court's decision in *Freightliner*, which held that the absence of a federal regulation served as no preemptive bar to a state common law damages action. The preemption clause in the National Traffic and Motor Vehicle Safety Act of 1966 (NTMVSA) considered by this Court in *Freightliner*, however, is different from the one at issue here. The NTMVSA preemption clause provided: "Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,] any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." 15 U.S.C. 1392(d) (1988). The FBSA premption clause, by contrast, provides that, "[u]nless permitted by the Secretary * * *, a State * * * may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment * * * that is not identical to a regulation prescribed under section 4302 of this title." 46 U.S.C. 4306. The Court based its decision in *Freightliner* on the introductory clause of the preemption provision, which required, as a prerequisite for preemption, that a federal regulation be "in effect" for the same aspect of performance. See 514 U.S. at 286. The FBSA's introductory clause is not written in a comparably limiting manner.

declined to institute rulemaking proceedings to require propeller guards. Accordingly, under petitioners' interpretation, the absence of a federal regulation concerning propeller guards is sufficient to save their claims from preemption under Section 4306.

3. The Court need not express an opinion as between those two readings of the express preemption provision. Even under the Coast Guard's longstanding interpretation of the preemption clause as discussed above, petitioners' common law claims are not preempted by Section 4306. That is so because this case does not concern any prescriptive state regulations, and the court of appeals' conclusion that a common law claim is not expressly preempted draws support from the text of Section 4306 itself and from the text and structure of the Act as a whole.

First, a judicial ruling in a tort action is not "a law or regulation establishing a recreational vessel * * * performance or other safety standard or imposing a requirement for associated equipment." As the plurality noted in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), "the presumption against pre-emption might give good reason to construe the phrase 'state law' in a pre-emption provision more narrowly than an identical phrase in another context." *Id.* at 522 (opinion of Stevens, J.). Moreover, as we argued in *Freightliner* with respect to similar language, a "standard" "would not ordinarily be thought to include duties of care that derive from the process of common law adjudication." U.S. Amicus Br. at 13 (No. 94-286). For example, a duty of care established in one tort suit with respect to one vessel and its associated propulsion system might or might not translate into a duty of care with respect to a different boat used in different circumstances. The term "standard" in Section 4306, therefore, is best understood to refer to a more definite gauge prescribed in advance by legislative or

administrative authorities. That understanding is further supported by use of the term "standard" in the FBSA to describe the regulations issued by the Secretary, which are prescriptive in nature and do not encompass common law liability. See 46 U.S.C. 4302. See also *Webster's Third New International Dictionary* 2223 (1986) (defining "standard"; def. 3a: "something that is established by authority, custom, or general consent as a model or example to be followed"; def. 7b: "carefully drawn specifications covering manufacturing material or equipment").[9]

Second, a court in a common law damages action would not normally be thought of as a "State or political subdivision of a State" within the meaning of Section 4306. Properly read, the preemption clause requires executive officers of the State or political subdivision to apply to the Secretary for permission to "establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other

[9] The reference to "requirement" in the preemption clause does not change the analysis in the text. Although this Court in *Cipollone* found preemption of common law claims in a statute that used the word "requirements," the statutory language there was much broader. In that case the statute preempted "requirement[s] or prohibition[s] . . . imposed under State law." 505 U.S. at 520. While "state law" is broad enough to encompass state common law applied in tort actions, Section 4306 refers to "*a* law or regulation * * * *imposing* a requirement" (emphasis added), which is more naturally read to refer only to state positive law imposing prescriptive requirements that are similar to the "standards" that are also mentioned in Section 4302. Furthermore, the "requirement" in *Cipollone* involved "obligations 'with respect to the advertising or promotion' of cigarettes," *ibid.*, a more general and sweeping set of conditions on tobacco companies than a finding of liability would be with respect to a particular boat equipped with a particular propeller-driven propulsion system. Another distinction between the FBSA and the statutes at issue in *Cipollone* and *Medtronic* is that those statutes did not contain savings clauses expressly preserving common law claims.

safety standard." Absent much clearer textual language, it would be anomalous to compel state judicial officers to apply to the Secretary for authority to continue a damages action premised on a negligent design theory of liability. Extensive case law exists on a variety of theories alleging the negligent design of a boat. Except in cases involving propeller guards, the notion that federal standards (or the absence of standards, as the case may be) preempt common law design defect claims appears not to have been contemplated by courts and litigants.[10] The experience with

[10] See, *e.g.*, *Detroit Marine Eng'g* v. *McRee*, 510 So. 2d 462 (Miss. 1987) (negligent design in boat steering device); *Rose* v. *Mercury Marine*, 483 So. 2d 1351 (Miss. 1986) (defective design of motor and boat states cause of action); *Young* v. *Tide Craft, Inc.*, 242 S.E.2d 671 (S.C. 1978) (assessing whether manufacturer's failure to install kill switch constituted defect); *Becker* v. *U.S. Marine Co.*, 943 P.2d 700 (Wash. App. 1997) (defective design of seating area in bow); *Dubecky* v. *S2 Yachts, Inc.*, 651 N.Y.S.2d 602 (App. Div. 1996) (defective design of cut-out transom and motor well of fishing boat); *Van Berkum* v. *Christian*, 530 N.E.2d 52 (Ill. App. 1988) (design defect claim of gear-shifting mechanism).

Prior to the Coast Guard's decision in 1990 not to promulgate a regulation concerning propeller guards, the idea that the absence of a federal standard on propeller guards might preempt state common law damages claims appears not to have been argued by litigants. See *Degen* v. *Bayman*, 241 N.W.2d 703 (S.D. 1976) (affirming award for plaintiff in propeller injury case). After the 1990 decision, boat manufacturers were sporadic in claiming preemption, although when they did, they typically prevailed with that argument. See, *e.g.*, *Ryan* v. *Brunswick Corp.*, 557 N.W.2d 541 (Mich. 1997) (finding preemption of claim predicated on failure to install propeller guard); *Beech* v. *Outboard Marine Corp.*, 584 So. 2d 447 (Ala. 1991) (preemption not discussed, but manufacturer prevailed on holding that failure to provide propeller guard fails to state cognizable claim); *Fitzpatrick* v. *Madonna*, 623 A.2d 322 (Pa. Super. Ct. 1993) (considering but rejecting claim of defective design in failure to install propeller guard); *Moss* v. *Outboard Marine Corp.*, 915 F. Supp. 183 (E.D. Cal. 1996) (finding

"kill switches" is instructive in showing the distinction between the ways the Coast Guard has viewed its power to preempt state positive law versus common law when it has not promulgated a regulation. Although the Coast Guard has exchanged correspondence with state officials to discourage the promulgation of a prescriptive state rule requiring kill switches on motorboats, it has not taken the position that common law claims predicated on a failure by manufacturers to install such devices are preempted by federal law.[11]

Third, 46 U.S.C. 4302(a) provides that the "Secretary may prescribe regulations establishing *minimum* safety standards" (emphasis added). The rationale for "specifying that performance rather than design requirements be adopted is to encourage manufacturers to compete freely in developing and selecting means of meeting or surpassing the performance standards." S. Rep. No. 248, *supra*, at 17. In view of the preemption clause voiding state rules and regulations that are not "identical" to federal stan-

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preemption of state common law claims under FBSA); *Davis* v. *Brunswick Corp.*, 854 F. Supp. 1574 (N.D. Ga. 1993) (same).

[11] A kill switch is a device that stops the throttle when the operator of the boat is thrown overboard. In 1979, the State of Alabama requested an exemption from the Coast Guard in order to impose a state regulation requiring a kill switch. In correspondence with the State, the Coast Guard explained that that request necessitated publication and opportunity for comment in the *Federal Register*. Alabama subsequently withdrew its request for an exemption. (That correspondence has been lodged with the Clerk and served upon counsel for the parties.) Contemporaneously with Alabama's request, there was litigation concerning kill switches in several state courts. See, *e.g.*, *Boatland of Houston, Inc.* v. *Bailey*, 609 S.W.2d 743 (Tex. 1980) (considering claim of defective design in failure to install kill switch but holding that evidence was sufficient to warrant verdict for defendant seller); *Young* v. *Tide Craft, Inc.*, 242 S.E.2d 671 (S.C. 1978) (holding that manufacturer's failure to install kill switch in boat did not constitute design defect).

dards, as well as the savings clause preserving state common law claims (discussed below), it is reasonable to infer that Congress intended the federal requirements to be a floor with respect to safety measures that manufacturers must adopt. In certain circumstances, tort liability may provide incentives for manufacturers to provide a higher standard of care than the "minimum safety standard" mandated by the Secretary in federal regulations.

Fourth, the preemptive scope of Section 4306 must be construed in light of the savings clause contained in 46 U.S.C. 4311(g), which provides: "Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." As explained above, the words used in Section 4306, standing alone, do not appear to preempt common law actions. In addition, Congress's explicit recognition of "common law" claims in Section 4311(g)—and its omission of that phrase in Section 4306—further supports a reading of "law or regulation" in Section 4306 as not encompassing common law claims. See, *e.g.*, *City of Chicago* v. *Environmental Defense Fund*, 511 U.S. 328, 338 (1994) ("'[I]t is generally presumed that Congress acts intentionally and purposely' when it 'includes particular language in one section of a statute but omits it in another'") (quoting *Keene Corp.* v. *United States*, 508 U.S. 200, 208 (1993)).

Not only does the language of Section 4311(g) aid in the construction of Section 4306, but the savings clause also makes clear Congress's explicit intent to preserve tort liability. The Senate Report states that the savings clause was enacted "to assure that in a product liability suit mere compliance by a manufacturer with the minimum standards promulgated under the Act will not be a complete defense to liability." S. Rep. No. 248, *supra*, at

31-32.[12] A fortiori, where, as here, the Coast Guard has chosen not to promulgate a safety standard governing the relevant aspect of performance, the FBSA does not furnish "a complete defense to liability."

Nor does a reading of Sections 4306 and 4311(g) that permits common law claims in these circumstances undermine any purposes of the Act. The regulatory effect of a common law judgment is not as direct as that of positive enactments or prescriptions. See *English*, 496 U.S. at 85 (common law claims "neither direct nor substantial enough" to be within the preempted field); *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 186 (1988) (noting that Congress may find the "incidental regulatory pressure" of state common law claims acceptable even if it concludes that direct state regulatory action is not); see also *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) ("Congress intended * * * to tolerate whatever

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[12] The addition of the savings clause was a "Committee amendment" to the original bill. S. Rep. No. 248, *supra*, at 31. The language of the enacted savings provision closely tracks concerns expressed by Richard Schwartz, Executive Director, Boat Owners Association of the United States, who testified that:

> [W]e would recommend a savings provision with respect to the consumers' private remedies, which is not touched upon by the present Bill. We would like to see it explicitly clarified that compliance with standards issued under the Act does not relieve the manufacturer from liability under State or common law in private law suits. It should be made clear that this Act does not preempt state or common law. In addition, we would further state that the failure of the Secretary to promulgate a standard shall not be admissible in a private proceeding. This would preclude a manufacturer from utilizing against the consumer the lack of a standard as evidence of a safe condition.

National Boating Safety Program: Hearing on S. 696 Before the Merchant Marine Subcomm. of the Senate Comm. on Commerce, 92d Cong., 1st Sess. 88 (1971).

tension there was between [federal regulation and state common law claims, and] [w]e can do no less.").[13]

Any decision by manufacturers to respond to state tort liability for propeller-related injuries by placing a propeller guard on a boat will depend on a cost-benefit analysis of the risks associated with incurring liability in a personal injury case versus the costs and risks of putting propeller guards on boats.[14] With respect to certain models of boats used for particular purposes, such a weighing by the manufacturer may lead to the conclusion that the risks of incurring liability warrant no action. With respect to other products, the manufacturer may conclude that the risks justify a range of alternatives, including giving a prospective boat owner the option of installing a propeller guard, making that device a standard feature, or discontinuing propeller-driven propulsion systems altogether for certain types of boats.[15] Propeller-

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[13] In other circumstances, Congress has expressly ousted state common law claims where it has intended that result. See, *e.g.*, 17 U.S.C. 301(a) (preempting rights "under the common law or statutes of any State"); 29 U.S.C. 1144(c)(1) (preempting all state "laws, decisions, rules, regulations, or other State action having the effect of law").

[14] See, *e.g.*, Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. Legal Stud. 357, 358-359 (1984) (social utility of imposing regulations versus allowing tort liability to proceed "is assumed to equal the benefits parties derive from engaging in their activities, less the sum of the costs of precautions, the harms done, and the administrative expenses associated with the means of social control"); *United States* v. *Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (L. Hand, J.) (liability itself stems from a weighing of the probability of injury, the severity of injury, and "the burden of adequate precautions").

[15] As the record in this case makes clear, the Propeller Guard Subcommittee ascertained that "there are no indications that there is a generic or universal solution currently available or foreseeable in the future. The boating public must not be misled into thinking there is a 'safe' device which would eliminate or significantly reduce such injuries

strike injuries have involved a range of different boat types, from houseboats to miniboat racers.[16] Thus, a decision by a manufacturer to respond to a lawsuit charging negligence in the design of particular boats for particular uses stands in stark contrast to state prescriptive regulations that attempt to create uniformity in the manufacture of all propeller-driven vessels, or even with regard to all products within a certain sub-class of vessels.

4. The court of appeals held that the preemption provision of the FBSA does not preempt a state common law tort claim for defective product design because the savings provision of Section 4311(g) required it to "construe the Act's preemption clause narrowly." Pet. App. A14. The court observed that "[t]he preemption clause easily could be read to cover common law claims, but because the savings clause indicates that at least some common law claims survive express preemption, we cannot give the preemption clause that broad reading." *Ibid.* Yet in declining to construe the savings clause affirmatively to allow petitioners' claims to proceed, the court functionally read the express preemption clause and the express savings clause to cancel each other out, and chose to resolve this case on implied preemption grounds, based on a supposedly overriding policy of uniformity not expressly

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or fatalities." J.A. 136-137. A range of different propeller guards have been patented, however, and alternative propulsion systems such as water jet propulsion (the method used in jet skis) may provide suitable alternatives to certain types of existing propeller-driven boats. See J.A. 202-209.

[16] See, *e.g.*, 60 Fed. Reg. 25,191 (1995) (houseboat); *Seymour* v. *Brunswick Corp.*, 655 So. 2d 892 (Miss. 1995) (165-horsepower MerCruiser on 19-foot Glastron boat); *Calabro* v. *Outboard Marine Corp.*, 599 So. 2d 717 (Fla. Ct. App. 1992) (miniboat); *Veal* v. *Teleflex, Inc.*, 586 So. 2d 188 (Ala. 1991) (bass fishing boat); *Beech*, 584 So. 2d at 447 (85-horsepower Johnson boat engine); *Degen*, 241 N.W.2d at 705 (210-horsepower Outboard Marine engine).

mandated by the text of the Act. Our reading of the express preemption and savings provisions, by contrast, gives effect to both: it ensures that state positive rules or regulations are preempted, while saving common law liability claims. There is no indication in the text or legislative history of the savings clause that Congress intended to preserve only certain common law claims, as the court of appeals held. See *id.* at A21-A23. And it would be illogical to suppose that, while Congress was explicitly preserving common law claims based on a failure of persons to comply with federal standards, it intended *not* to save such claims when no standard at all was in effect.

B. The Coast Guard's Decision Not To Regulate Propeller Guards Does Not Impliedly Preempt State Common Law Tort Claims Alleging That The Manufacturer Should Have Installed A Propeller Guard

1. This Court has noted that a finding of "implied conflict pre-emption [is appropriate] where it is 'impossible for a private party to comply with both state and federal requirements,' * * * or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Freightliner*, 514 U.S. at 287 (quoting *English*, 496 U.S. at 79, and *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)). The Coast Guard's conclusion in 1990 that the available data did not justify the issuance of regulations concerning propeller guards is not a basis for implied conflict preemption of petitioners' common law tort claims.[17]

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[17] Respondent overstates what the Coast Guard decided with respect to propeller guards. The Coast Guard has never formally determined that "a requirement [of propeller guards] would be contrary to the interests of boat safety." Br. in Opp. I (statement of question presented); see also *id.* at 15 ("The Coast Guard determined * * * that propeller guards should not be required because it would make

It would not be impossible for respondent to comply with both state and federal law: there is simply no federal standard with which a private party must comply. Nothing in the FBSA or in the Coast Guard's regulations currently regulates the use of propeller guards. Because the Coast Guard has imposed no standard either mandating or prohibiting propeller guards, motorboat manufacturers are free to install propeller guards or to pay any common law judgments resting on the premise that it was negligent for the manufacturer not to have installed such a device. In this respect, the agency's decision not to promulgate a regulation because the available data did not support one is indistinguishable from *Freightliner*, where a court of appeals had held that the evidence was insufficient to justify the regulation promulgated by the agency. See 514 U.S. at 286-287.[18]

Nor does petitioners' lawsuit frustrate "the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67. Petitioners' common law claims do not hinder in any way the ability of the

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boating *less* safe."). If it had reached that conclusion, the Coast Guard may well have prohibited propeller guards. The Coast Guard stated only that the "[a]vailable propeller guard accident data do not support imposition of a regulation requiring propeller guards." J.A. 163. The Coast Guard's acceptance of the Advisory Council's recommendation does not necessarily constitute an endorsement of all of the information gathered by the Propeller Guard Subcommittee. The subsequent requests by the Coast Guard for public comment on various proposals regarding propeller guards and alternative means of reducing the number of propeller strike deaths and injuries are fully consistent with its conclusion in 1990 that the data at that time did not warrant imposition of a mandatory requirement for propeller guards on all propeller-driven motorboats. See pages 7-8, *supra*.

[18] In *Freightliner*, we filed a brief as *amicus curiae* arguing that a state common law tort action was neither expressly nor impliedly preempted in similar circumstances. See U.S. Br. (No. 94-286).

Coast Guard to promulgate federal regulations regarding propeller guards, should the appropriate justifications for such action be present. See *Freightliner*, 514 U.S. at 289. Under our reading of the savings clause, a common law claim would be permitted even if a regulation were in existence unless that claim propounded a standard of conduct directly contrary to the federal rule. See *CSX Transp.*, 507 U.S. at 676.

2. In holding that petitioners' claims were impliedly preempted (Pet. App. A15-A25), the court below erred. The court misread the FBSA to give the Coast Guard "exclusive authority to issue safety standards." *Id.* at A18; see also *id.* at A20. As we have explained, the congressional intent to achieve uniformity was not so absolute as to leave no room for common law actions. From that erroneous premise, the court then selectively distilled language from this Court's opinions for the proposition that, when an agency has primacy in a particular regulated field, "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much preemptive force as a decision *to* regulate." *Id.* at A16 (quoting *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983)). This Court, however, has not often found those circumstances to exist. In *Arkansas Electric Cooperative* itself, for example, this Court ultimately held that "nothing in the language, history, or policy of the Federal Power Act suggests such a conclusion" that a decision not to issue federal regulations should preempt state regulation. 461 U.S. at 384. And although the court below acknowledged (Pet. App. A16) that "a decision not to regulate does not always have preemptive effect, *see Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988),"

it overlooked a crucial point made by this Court in that case:

> *Transcontinental* [*Gas Pipe Line Corp.* v. *State Oil and Gas Bd. of Miss.*, 474 U.S. 409 (1986)] was not meant to announce a new rule of burden-shifting whenever the Federal Government terminates or reduces its regulation of a field of commerce, replacing the normal need for finding a federal intent to pre-empt with a need to find a federal intent to retransfer authority to the States. To the contrary, a "clear and manifest purpose" of pre-emption is always required.

485 U.S. at 503. Thus, *Arkansas Electric Cooperative*, *Puerto Rico Department of Consumer Affairs*, *Freightliner*, and *Medtronic* all support our view that, as in this case, the absence of a federal regulation does not create a preemptive effect on state common law claims when the federal scheme is not intended to occupy the complete field of motorboat safety.

A different result is not suggested by this Court's decision in *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978).[19]

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[19] The cases on which this Court relied in *Ray* were in areas of well-established federal law concern. See, *e.g.*, *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 152 (1989) (state intellectual-property action held preempted notwithstanding the absence of an explicit federal regulation in the field because the Court's "past decisions have made clear that state regulation of intellectual property must yield to the extent that it clashes with the balance struck by Congress in our patent laws"); *Bethlehem Steel Co.* v. *New York State Labor Relations Bd.*, 330 U.S. 767, 774-775 (1947) (failure of National Labor Relations Board to entertain certain actions was actually a determination by the Board "and an exercise of its discretion to determine that [foremen's bargaining units] were not appropriate for bargaining purposes"); *Hines*, 312 U.S. at 66-67 (holding preempted state laws that imposed obligations on aliens because the federal government had enacted a "complete scheme of regulation" and "states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations"); *Napier* v. *Atlantic Coast Line R.R.*, 272 U.S. 605, 613 (1926) (holding state positive law preempted because it purported to impose rule in regulatory field already occupied by federal statute, even though the agency "has not seen fit to exercise its authority to the full extent conferred").

That case also involved the Coast Guard, but it concerned a statutory scheme that is quite distinctive from the one at issue here. As the Court explained in *Ray*, the Ports and Waterways Safety Act of 1972 (PWSA) *required* the Secretary to issue "such rules and regulations as may be necessary with respect to the design, construction, and operation of the covered vessels." *Id.* at 161. By contrast, the FBSA takes a different approach: it does not require the Secretary to issue regulations, but rather merely permits him to. Moreover, the FBSA does not address design features of covered vessels in the comprehensive manner addressed in the PWSA. Compare 46 U.S.C. 4302(a) (Secretary "may prescribe regulations establishing minimum safety standards" and "requiring the installation, carrying, or use of associated equipment * * * on recreational vessels subject to this chapter") with 46 U.S.C. 3703(a) ("The Secretary shall prescribe regulations for the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of vessels to which this chapter applies.") (recodification of 46 U.S.C. 391a(3) (1976), which the Court construed in *Ray*). In addition, the rule at issue in *Ray* was a state prescriptive rule rather than a common law cause of action. That distinction is equally important here, because the FBSA contains a savings clause, but the PWSA, at issue in *Ray*, did not. Pub. L. No. 92-340, 86 Stat. 424.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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